

Torts - Liability for Damage Caused by Trespassing Cattle

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pany may then proceed against the insured on the basis of unjust enrichment or fraud to recover the amount paid.⁴⁴

Ben R. Miller, Jr.

TORTS — LIABILITY FOR DAMAGE CAUSED BY TRESPASSING CATTLE

Plaintiff sued to recover for damage to his crops caused by defendant's cattle straying from adjacent land. Plaintiff's lessor had an agreement with defendant whereby each was to maintain half of the fence between them.¹ Defendant's cattle escaped through the half of the fence which plaintiff's lessor had agreed to maintain, and damaged the plaintiff's crop. The district court awarded judgment for the plaintiff. On appeal the defendant claimed that the agreement released him from liability, that he was not at fault, and that plaintiff had abandoned the crop and thus suffered no damage. The court of appeal, *held* reversed. Though the defendant was exonerated upon the finding that the plaintiff had previously abandoned his crop and thus suffered no pecuniary damage, the court announced that in absence of a local ordinance the burden was on the defendant to show that he was without the slightest fault, and that he did all that was possible to prevent damage by his cattle. The defendant did not meet this burden and the agreement did not relieve him of the duty to keep his cattle enclosed. *Harris v. Roy*, 108 So.2d 7 (La. App. 1958).

According to Article 1385 of the French Civil Code, the owner or custodian of an animal is responsible for the damage that the animal has caused, even if the animal had strayed or run away.² Originally the French courts interpreted this article as imposing a presumption of fault on the part of the animal owner, which could be rebutted by merely showing that the owner had used reasonable care.³ However this position has changed

44. *Travelers Fire Ins. Co. v. Ackel*, 29 So.2d 617 (La. App. 1947) (recovery of insurance payment from insured allowed). See *Pennsylvania Fire Ins. Co. v. Harrison*, 94 So.2d 92 (La. App. 1957).

1. Plaintiff's lessor failed to tell plaintiff of the agreement between himself and defendant.

2. LA. CIVIL CODE art. 1385 (1870): "The owner of an animal, or he who uses it, while he is using it, is responsible for the damage that the animal has caused, whether the animal was in his keeping or strayed or runaway."

3. DALLOZ, ANNOTATIONS TO FRENCH CIVIL CODE, art. 1385 (1959). See 2 MAZEAUD & TUNC, TRAITÉ THEORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVIL DELICTUELLE ET CONTRACTUELLE 59, § 1073 (5th ed. 1958).

through the years and today there is a presumption of liability, rather than fault, imposed upon the owner. In order to exonerate himself from responsibility, he must prove the accident was due to the fault of the victim, or that it was the result of an Act of God, or solely the result of an act of a third person.⁴ It does not suffice to prove that he was himself free of fault and had exercised due care in keeping the animal.⁵ This responsibility, stipulated in Article 1385, is founded upon the idea that a man is a guardian of the things in his charge; and thus since he has the control and direction of these things, he should be responsible for their wrongdoings. Though the owner is presumed to be the guardian of his animal, he may rebut this presumption and thus escape liability by showing that when the damage occurred the animal had been in the custody of another.⁶

In the English common law the owners of domestic animals have been held strictly liable for damage done by the animals. The obligation rests on the owner to fence his animals in, not on the neighbor to fence them out.⁷ Since the animal owner is held strictly liable, it is immaterial that he is found not to be negligent, or that the plaintiff was guilty of contributory negligence.⁸ The real policy behind the imposition of this liability seems to have been the ease with which cattle can be confined in England, traditionally a land of small fenced-in areas.⁹

The common law rule of strict liability is the law in many of the eastern states of this country,¹⁰ but the antithesis of this position is found in many of the western states.¹¹ In these latter states from the period of settlement it had been the general custom of the people to allow their cattle¹² to range upon the unen-

4. See note 3 *supra*.

5. See note 3 *supra*.

6. See note 3 *supra*.

7. A leading case is *Cox v. Burbidge*, 13 C.B.N.S. 430, 138 Eng. Rep. 1267 (1863). See PROSSER, TORTS 319 (2d ed. 1955). See also 2 HARPER & JAMES, TORTS 821, § 14.9 (1956).

8. See note 7 *supra*.

9. The rule of strict liability, originating with liability for trespass of cattle for straying from the owner's premises, was never extended to include animals straying or wandering from the highway on which they were being lawfully driven. See 2 HARPER & JAMES, TORTS 822, § 14.9 (1956).

10. See, e.g., *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924); *Stackpole v. Healy*, 16 Mass. 23, 8 Am. Dec. 121 (1819); *Tonawanda R.R. v. Munger*, 5 Denio 255, 49 Am. Dec. 239 (N.Y. 1848). See also 2 HARPER & JAMES, TORTS 822, § 14.9 (1956).

11. See, e.g., *Wagner v. Bissell*, 3 Iowa 396 (1856); *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557 (1902); *Delaney v. Errickson*, 10 Neb. 492, 6 N.W. 600 (1880). See also PROSSER, TORTS 320 (2d ed. 1955).

12. As this note concerns trespassing cattle only, the liability of the owner of

closed plains. Owing to the great value of the lands for pasturage and the scarcity of materials for fencing prior to the development of barbed wire, the imposition of such liability would have hampered this important and productive use of the country. It was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular and oblige cattle owners to incur the heavy expense of fencing their land or else be held as trespassers by reason of their cattle straying upon the land of others.¹³ It has been felt that the interest in using land for the cattle industry should be protected at the expense of the interest in quiet enjoyment and exclusive possession of the land. The only way a plaintiff could successfully claim damages for trespass by cattle was to have his land properly fenced.¹⁴ Today in many areas of the West the reasons for the rejection of the common law rule are not so compelling as they were at one time. As a result many states have in effect restored it by legislative enactments prohibiting owners from permitting their cattle to roam at large and making the owners liable for damages resulting from their failure to restrain their animals.¹⁵ In nearly all states the owner of cattle is liable for their trespass if the complaining landowner maintains a fence as required by statute.¹⁶ In other jurisdictions, by statute, particular localities or political subdivisions such as counties are vested with authority to reinstate the common law rule.¹⁷ The matter is now very largely governed by local statutory provisions.¹⁸

According to La. R.S. 3:2801-2808 wards of each parish have the option to require fencing in of livestock.¹⁹ There is a need

a vicious or inherently dangerous animal, or animals escaping from a highway will not be discussed.

13. *Delany v. Errickson*, 10 Neb. 492, 6 N.W. 600 (1880). See 2 HARPER & JAMES, TORTS 823, § 14.9 (1956).

14. See 2 HARPER & JAMES, TORTS 823, § 14.9 (1956).

15. See, e.g., *Puckett v. Young*, 112 Ga. 578, 37 S.E. 880 (1901); *Gumm v. Jones*, 115 Mo. App. 597, 92 S.W. 169 (1906). See also PROSSER, TORTS 320 (2d ed. 1955).

16. See, e.g., *Delaney v. Errickson*, 10 Neb. 492, 6 N.W. 600 (1880); *Winters v. Turner*, 74 Utah 222, 278 Pac. 816 (1929); RESTATEMENT, TORTS, § 504(2) (1934). See also 2 HARPER & JAMES, TORTS 823, § 14.10 (1956).

17. See, e.g., ARIZ. CODE ANN. § 50-604 (1939); ARK. STAT. ANN. § 78-1140 (1947).

18. See, e.g., *Garcia v. Sumrall*, 58 Ariz. 526, 121 P.2d 640 (1942); *Osborne v. Osmer*, 82 Colo. 80, 256 Pac. 1092 (1927); *Johnston v. Mack Mfg. Co.*, 65 W.Va. 544, 64 S.E. 841 (1909). See also PROSSER, TORTS 320 (2d ed. 1955).

19. LA. R.S. 3:2801 (1950): "Every ward of every parish in the state shall have the right, by local ordinance, to prohibit livestock from roaming at large on the highway in each ward.

"Some ordinances require the owner to fence out and some to fence in. Where

of local option because of the great diversity of occupation, population, geography, etc., of the different parishes. In the absence of a controlling local ordinance, Louisiana Civil Code Article 2321 would control; this article provides that the owner of an animal is liable for the damage it causes.²⁰ Article 2317 of the Louisiana Civil Code provides that a person is responsible for the damage which is caused by the things he has in his possession. These articles could well lead one to believe the codifiers contemplated a form of absolute liability.²¹ Article 2321 of the Code contains a provision for "noxal surrender" whereby if the animal has been lost, or has strayed more than a day, the owner may discharge himself from responsibility by abandoning the animal to the person who has sustained the injury unless the animal is dangerous or noxious. This provision would afford the owner some relief from such strict liability.²² However, the Louisiana courts have never applied a doctrine of strict liability, but have generally followed the older French position applying a presumption of fault which was rebuttable by a showing of no negligence.²³ Accordingly the *defendant* may successfully rebut this presumption by showing *he* maintained a substantial fence.²⁴ However, on two occasions the defendant has been allowed to avoid liability by showing that the *plaintiff* had not constructed the fence, on the theory that even in the absence of a fencing

there is an ordinance requiring fencing out, failure to comply with the ordinance shows contributory negligence." *Ingargiola v. Schnell*, 11 So.2d 281 (La. App. 1943).

20. LA. CIVIL CODE art. 2321 (1870): "The owner of an animal is answerable for the damage he has caused."

21. *Id.* art. 2317: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

22. *Id.* art. 2321: "If the animal had been lost or strayed more than a day, he may discharge himself from this responsibility by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal."

23. *Bentz v. Page*, 115 La. 560, 39 So. 599 (1905); *Raziano v. T. L. James & Co.*, 57 So.2d 251 (La. App. 1952); *Boudreau v. Louviere*, 178 So. 173 (La. App. 1938); *Mercer v. Marston*, 3 La. App. 97 (1926). LA. CIVIL CODE art. 2321 (1870) imposes absolute liability for damage, subject to the negligence or fault requirement of Articles 2315 and 2316. Where the animal breaks through the fence, this breaking is itself a presumption of fault. Note that the language above which says that Article 2321 has the same general type of liability as Article 2315, requiring proof of fault by the plaintiff, is refuted by the very holding of the court which stipulated that Article 2321 carries with it a presumption of fault; thus the language saying that the two articles provided the same burden of proof is dicta. This is not the only case confusing the burden required by these articles. See *Tripiani v. Meraux*, 184 La. 66, 165 So. 453 (1936); *Damonte v. Patton*, 118 La. 530, 43 So. 153, 8 L.R.A. (N.S.) 209 (1907).

24. *Ansardi v. Potter*, 71 So.2d 347 (La. App. 1954); *Abraham v. Castille*, 158 So. 650 (La. App. 1935).

statute or ordinance a plaintiff must have his land fenced in before he can recover for damage done by trespassing cattle.²⁵

In the instant case the court was faced with the problem of determining the duty imposed on a cattle owner in the absence of a local ordinance. The court stated that a duty is imposed upon the defendant to show he was without the slightest fault. But the court then announced that a cattle owner is not to be treated as an insurer against all damage caused by his cattle. Here the cattle owner had not kept a part of the fence in sufficient repair, because of the fencing agreement; this was the only "fault" imputed to defendant, yet the court would have held him liable.²⁶ Thus the court demands a very high degree of care; such a demand is understandable in light of the growing population leaving fewer areas where an unfenced herd of cattle is the normal thing. This case seems contrary to the decision of the two Louisiana cases which require the owner of the damaged property to fence in his property before he can claim damages. The decision explicitly states that the agreement whereby defendant was not responsible for the upkeep of the part of the fence through which the cattle escaped would not relieve defendant of his duty to keep his cattle properly enclosed.²⁷ Apparently plaintiff need have no fence at all.

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WORKMEN'S COMPENSATION — SCOPE OF THE LOUISIANA STATUTE — DEFINITION OF BUSINESS

Plaintiff sustained injuries while employed by defendant in the construction of defendant's residence, the only one defend-

25. *Parrott v. Babb*, 132 So. 377 (La. App. 1931); *Morgan v. Patin*, 47 So.2d 91 (La. App. 1950). See Note, 5 LOUISIANA LAW REVIEW 316, 318 (1954): "Where . . . there is no [ordinance preventing stock from running at large,] it is up to the property owner to fence the livestock off his premises, and plaintiff must show that his property was enclosed with a sufficient fence before he can recover for damage done by trespassing animals."

26. At common law where an owner of land is bound by agreement to maintain a fence, and through defects in it his neighbor's cattle enter upon his land and do damage, without the fault of the owner, as a general rule, it may be said that the landowner cannot recover therefor. If a partition fence has been divided and a particular portion assigned to each of the adjacent proprietors to keep in repair, each is liable for trespasses committed only through defects in his own part of the fence. Only when cattle escape through that part of the fence to be maintained by the plaintiff is the cattle owner relieved of liability for his trespassing cattle. See 2 HARPER & JAMES, TORTS 829, § 14.10 (1956). Louisiana cases on this point could not be found; the instant case holds that a fencing agreement would not relieve a cattle owner from liability. Apparently in the absence of a local ordinance, this should be taken as the Louisiana position.

27. See note 26 *supra*.